No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, SHAREHOLDERS PROTECTIVE COMMITTEE OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

HOMEOWNERS' PETITION FOR REHEARING.

F. Henry NeCasek,
3233 East Anaheim Street,
Long Beach 4, California,
Attorney for Appellee Home Investment Company of Long Beach, et al., Interveners.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, SHAREHOLDERS PROTECTIVE COMMITTEE OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

HOMEOWNERS' PETITION FOR REHEARING.

Home Investment Company, appellee, desires rehearing to present the question of reclouding of its titles, and those of other homeowners, aggregating several hundred homes, apart from the mass of lengthy record and briefs which seem to have obscured the Court of Appeals' consideration of this vital question of the homeowners' titles.

The Court of Appeals' opinion tends towards:

1. Dismissal for failure to exhaust administrative remedies which were non-existent as applying to these homeowners.

2. Preventing interpleader relief in court until Long Beach Association (over which homeowners have no control) seeks or exhausts administrative remedies, which under no circumstances could clear the titles for the homeowners.

3. Dismissal and setting aside judgments which have been final for over four years, and which the United States Supreme Court refused to reverse on prior appeal. (Subsequent appeals to this Court of Appeals were also dismissed.)

This appellee is wholly unconcerned with the merits of the contentions between any of the conflicting parties. It seeks but one thing on this appeal: to preserve its titles cleared by final judgments of the court below in 1946, and subsequent years, almost six years ago. It was not one of the five original parties as such parties are designated on page 53 of the Opinion of this Honorable Court. It is interested in only one thing: the clearing of its titles. It seeks no other relief.

In reliance upon those final judgments, this appellee and numerous other interveners have conveyed the titles to approximately 400 homes thus cleared, and by such conveyances (grant deeds) have warranted to all future purchasers or encumbrancers, the validity and marketability of such title.

This appellee's only part in this litigation was that it had the misfortune of being a borrower from a federal savings and loan association. In June of 1946, it sought to pay off approximately $800,000.00 of its obligations by refinancing through another lending institution. Before the new loans could be made, reconveyances of the paid off trust deeds were required. Tender of the amount due to

appellant Ammann, the conservator, was made. Ammann's response was the titles would be forthcoming, in a few days. Thirty day escrows for the sale of the greater portion of said properties were then pending.

The next thing appellee heard, its notes and trust deeds (174 in number for approximately $800,000.00), were in the Registry of the United States District Court at Los Angeles. No title could be obtained without an order of that Court.

To compel appellee borrower, Home Investment Company and other interveners, to await the result of an administrative hearing, to which it could not be a party, would have resulted in irreparable damage and a gross injustice.

This appellee, therefore, in July of 1946, intervened in the court proceedings, paid its $800,000.00 into the registry of the court and secured an order of the court clearing its titles, and directing the clerk of the court to deliver to appellee's order, reconveyances of the 174 homes, security for the $800,000.00 loaned. Numerous other interveners proceeded in a similar movement.

The Court of Appeals' opinion, on page 52, now states that appellee Home Investment Company, as one of the original actions, was not entitled to ANY relief because, among other things, the Long Beach Association had not exhausted its administrative remedies. There are also approximately 50 other interveners, representing over 200 homes, who are in the same predicament.

This appellee respectfully urges the Court of Appeals to consider that the United States Supreme Court passed upon the sufficiency of such intervention proceedings, including the order quieting appellee's titles. The Supreme

Court did not order dismissal nor in any way assail the sufficiency of the intervention-interpleader proceedings or judgment; in fact, all courts heretofore passing on said litigation have jealously guarded the rights of the homeowner.

Appellants, in their briefs to the United States Supreme Court in 1947, then urged dismissal and this appellee's counsel attended the 1947 United States Supreme Court hearings in order, if necessary, to interplead into the United States Supreme Court, the $800,000.00 then in the Registry of the District Court. No such necessity appeared. Subsequently, more than 50 similar intervention actions were processed to conclusion without serious opposition except as to four appeals taken to this Court which were later dismissed.

If this Court of Appeals' opinion is to be followed by any order dismissing our intervention or interpleader judgments or proceedings, this appellee respectfully urges that the order direct the District Court to forthwith return to Home Investment Company the approximately $800,000.00 deposited by it in 1946 as well as over $500,000.00 deposited by the numerous other interveners. For only by the use of the deposited money in further proceedings before the United States Supreme Court, or elsewhere, can the homeowners' titles, cleared in 1946 and subsequent years, be protected.

Dismissal of the interpleader-intervention proceedings and voiding of the six-year-old judgments quieting titles, will of necessity recloud and re-encumber the approxi-

mately 174 homes, of this appellee and the over 200 others cleared in a similar manner, and long since sold to other innocent purchasers, and the subject of loans by other financial institutions. This appellee's and other interveners', grant deeds were made in reliance on the final judgments of the federal court in 1946, 1947, and 1948; and the covenants of clear and marketable titles implied by said grant deeds are liabilities of this appellee, the other homeowners, and of the Title Insurance Companies which insured such titles.

Unless the mandate of this Court of Appeals directs the clerk of the district court to immediately pay over the approximately $800,000.00 plus interest, costs and attorneys' fees to this appellee upon dismissal of the actions below, as well as moneys of other interveners in the registry of the court, it is respectfully urged that issuance of such mandate be stayed for sufficient time for this appellee to take appropriate proceedings before the United States Supreme Court in order to review what it regards as an invasion and violation of the United States Supreme Court's mandate of 1947, which directed further proceedings by the District Court in accordance with the United States Supreme Court opinion.

Nowhere in such United States Supreme Court mandate, or opinion, is there any direction for dismissal of the district court proceedings, nor for reclouding of the titles of the homeowners, cleared by the judgments of the district court, WHICH WERE NOT REVERSED IN THE 1946 APPEAL TO THE UNITED STATES SUPREME COURT.

Administrative Remedy Inadequate.

The Opinion precludes one confronted with conflicting claims from obtaining statutory relief in interpleader. The borrower is compelled to suffer suspension for an indefinite period of his right to clear the title to his home by one payment into court with certainty of discharge and adequacy of the release to clear his title. The borrower is compelled to await termination of administrative proceedings which are utterly inadequate, regardless of outcome, to grant him the immediate relief available by court interpleader. No benefit is conferred on anyone and much harm and damage both to the borrower and the Association is caused by this indefinite period of suspension.

The review proceedings may not accord the borrower any relief unless they be instituted in a court having physical jurisdiction of the borrowers' homes. Only such a court can make a judgment binding upon the title. The title was clouded by the appointment of the conservator and further clouded by the conservator's conveyance of that title to the San Francisco Bank.

No administrative proceeding can clear these clouds. Only a final judgment of the court within whose territory the real property is situated can settle this question.

Interpleader makes available such a final judgment to the borrower in ADVANCE of the decision of the merits. No other process affords instantaneous and final relief to the borrower. Interpleader relief is not suspended pending adjudication on the merits by the court as to the conflict between the claimants. No reason exists why the borrowers' relief of interpleader should be suspended pending an administrative proceeding inadequate to grant the borrower any relief.

The right of judicial review postpones validity of the administrative proceeding pending further trial of the facts before the reviewing court, and at least one appeal from that reviewing court.

Exhaustion of administrative remedy is based upon the assumption that the remedy is adequate and might obviate the necessity for any court proceedings. This reason has no application to the borrower, an innocent bystander, in the conflict between the shareholders and the conservator and particularly removed from the controversy between the Federal Home Loan Banks.

Inadequacy or delay in administrative remedy has long been recognized as justification for immediate recourse to the courts for equitable, injunctive, or other relief.

See:

Railway Express v. Jones, 106 F. 2d 341 (C. C. A. 7, 1939).

(At page 343):

". . . The Railway Express' right to file its interpleader is not established nor defeated by the merits of Plaintiffs' claim . . ."

(Again at page 345):

"By proceeding under the counterclaim of the Railway Express the jurisdiction of the Court will be unassailable, and the claims of all claimants may be litigated exactly the same as in a proper class suit.

"It therefore follows that as matter of wise discretion, as well as of recognizing a right which the Railway Express possessed absolutely, the court should, after the counterclaim was filed, have proceeded as provided for by the interpleader statute.

"The orders appealed from are reversed with directions to permit the filing of the counterclaim and to proceed further in this suit on said counterclaim . . ."

The opinion, by denying an interpleading borrower all right to "any relief" in court pending the administrative hearing and final "administration determination," destroys the one escape for the homeowner to clear his title. The homeowner is indifferent whether he pays the conservator, the association, the San Francisco Bank or Los Angeles Bank, but he dare not decide, except at his peril, which he will pay as it is futile to pay anyone unless and until his title is cleared by ONE PAYMENT.

Only the court in interpleader has authority to permit payment in ADVANCE OF THE DECISION OF THE MERITS. Interpleader was created by equity and later by Congressional enactment to remedy exactly this situation. A debtor, though anxious to pay his debt, is imperiled by two or more conflicting claims and demands, the merits of which may not be decided for years; there is no just reason why the borrower, who has encumbered his home, must stand helplessly by while the conservator, the Shareholders' Protective Committee and the Los Angeles, San Francisco and Portland Banks litigate their dispute for six or more years. These are not the disputes of the borrower.

The Opinion denies to the borrower his statutory right to interplead. The borrower has no interest in the administrative hearings nor is there any reason why he should travel 3,000 miles to Washington, D. C., to intervene in a fight over who has the right to collect the debt, which the borrower admits he owes.

The first titles were cleared by the order of the court below on July 13, 1946, approximately six weeks after commencement of the litigation. The Court of Appeals' opinion also invalidates these proceedings as premature and creates a suspension of all rights to court relief pending final administrative action—final administrative action, controlled exclusively by others than the borrower in which the borrower has no voice and which he can neither institute nor terminate, and the results of which under no circumstances could grant him any relief.

The administrative process could result only in one or two decisions:

(a) That the conservator is to remain; or

(b) That the conservator be removed;

both of which are subject to judicial review. Even that judicial review is of no immediate aid to the borrower unless it provides him with the place for payment of his loan and securing him, thereby, clear title.

The inadequacy of the administrative process is demonstrated by the futility of its orders as affecting land titles.

Postponement of the shareholders' and association's rights until conclusion of the administrative hearing, clearly aggravates the already festering sore of unmarketable titles created BY THE SEIZURE. The right to remove an invalidly appointed or acting conservator necessitates a process available to preserve for future decisions, the claims of the litigants and at the same time to enable the borrower to be certain that ONE PAYMENT to ONE AUTHORITY is conclusive to the validity of the borrower's relief.

For the purpose of brevity, Appellee Homeowners, join in and adopt the Petitions for Rehearing filed on behalf of all other Appellees.

Conclusion.

Based on the foregoing reasons, counsel for Appellee Homeowners, respectfully requests permission to re-argue this matter before the Court in bank or a panel thereof. In the event that a rehearing be denied, counsel requests an order staying the issuance of mandate, in order to afford an opportunity for a Petition for Certiorari before the Supreme Court of the United States.

Respectfully submitted,

F. Henry NeCasek,

Attorney for Appellee Home Investment Company of Long Beach, et al., Interveners.

Certificate of Merit.

F. Henry NeCasek, Attorney for Appellee, Homeowners, does hereby certify:

That he is attorney for Home Investment Company of Long Beach, *et al.,* Interveners, Appellees herein; that he makes this certificate in compliance with Rule 25 of the Rules of this Court; that in his judgment the within and foregoing Homeowners' Petition for Rehearing is well-founded in law and is not interposed for the purpose of delay.

F. Henry NeCasek.